

FILED: November 10, 1998

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-1604

BROWN & WILLIAMSON TOBACCO CORPORATION;
LORILLARD TOBACCO COMPANY; PHILIP MORRIS,
INCORPORATED; RJ REYNOLDS TOBACCO COMPANY,

Plaintiffs - Appellants,

and

COYNE BEAHM, INCORPORATED; LIGGETT GROUP,
INCORPORATED,

Plaintiffs,

versus

FOOD & DRUG ADMINISTRATION; DAVID A. KESSLER,
M.D., Commissioner of Food and Drugs,

Defendants - Appellees.

ATTORNEYS GENERAL OF THE STATE OF MINNESOTA;
STATE OF ALASKA; OF ARIZONA; STATE OF
ARKANSAS; STATE OF COLORADO; STATE OF
CONNECTICUT; STATE OF FLORIDA; STATE OF
HAWAII; STATE OF ILLINOIS; STATE OF INDIANA;
STATE OF IOWA; STATE OF LOUISIANA; STATE OF
KANSAS; STATE OF MAINE; STATE OF MARYLAND;
STATE OF MASSACHUSETTS; STATE OF MICHIGAN;
STATE OF MISSISSIPPI; STATE OF MISSOURI; STATE
OF MONTANA; STATE OF NEVADA; STATE OF NEW
HAMPSHIRE; STATE OF NEW JERSEY; STATE OF NEW
MEXICO; STATE OF NEW YORK; STATE OF NORTH
DAKOTA; STATE OF OHIO; STATE OF OKLAHOMA;
STATE OF OREGON; STATE OF PENNSYLVANIA; STATE
OF RHODE ISLAND; STATE OF SOUTH DAKOTA; STATE

OF TEXAS; STATE OF UTAH; STATE OF VERMONT;
 STATE OF WASHINGTON; STATE OF WEST VIRGINIA;
 STATE OF WISCONSIN; THE CITY AND COUNTY OF SAN
 FRANCISCO; PUBLIC CITIZEN; THE AMERICAN
 ACADEMY OF PEDIATRICS; AMERICAN CANCER
 SOCIETY; AMERICAN COLLEGE PREVENTIVE MEDICINE;
 AMERICAN HEART ASSOCIATION; AMERICAN LUNG
 ASSOCIATION; AMERICAN MEDICAL ASSOCIATION;
 AMERICAN MEDICAL WOMEN'S ASSOCIATION; AMERICAN
 PUBLIC HEALTH ASSOCIATION; AMERICAN SOCIETY OF
 ADDICTION MEDICINE; THE HMO GROUP; NATIONAL
 ASSOCIATION OF ELEMENTARY SCHOOL PRINCIPALS;
 NATIONAL ASSOCIATION OF SECONDARY SCHOOL
 PRINCIPALS; NATIONAL CENTER FOR TOBACCO-FREE
 KIDS; STATE OF KENTUCKY; WASHINGTON LEGAL
 FOUNDATION ("WLF"); MARIO ANDRETTI; DON
 GARLITS; AL UNSER; RUSTY WALLACE; CALE
 YARBOROUGH; RICHARD BURR, CASS BALLENGER,
 HOWARD COBLE, United States Representatives,
 LAUCHCLOTH, United States Senator,

Amici Curiae.

No. 97-1581

COYNE BEAHM, INCORPORATED; BROWN & WILLIAMSON
 TOBACCO CORPORATION; PHILIP MORRIS,
 INCORPORATED; RJ REYNOLDS TOBACCO COMPANY;
 NATIONAL ASSOCIATION OF CONVENIENCE STORES;
 ACME RETAIL, INCORPORATED; UNITED STATES
 TOBACCO COMPANY; CONWOOD COMPANY, LP; NATIONAL
 TOBACCO COMPANY, LP; PINKERTON TOBACCO
 COMPANY; SWISHER INTERNATIONAL, INCORPORATED;
 CENTRAL CAROLINA GROCERS, INCORPORATED; J.T.
 DAVENPORT, INCORPORATED; NORTH CAROLINA
 TOBACCO DISTRIBUTORS COMMITTEE, INCORPORATED;
 THE AMERICAN ADVERTISING FEDERATION; AMERICAN
 ASSOCIATION OF ADVERTISING AGENCIES;
 ASSOCIATION OF NATIONAL ADVERTISERS,
 INCORPORATED; MAGAZINE PUBLISHERS OF AMERICA;
 THE OUTDOOR ADVERTISING ASSOCIATION OF
 AMERICA, INCORPORATED; POINT OF PURCHASE

ADVERTISING INSTITUTE; LORILLARD TOBACCO
COMPANY,

Plaintiffs - Appellees,

and

LIGGETT GROUP, INCORPORATED,

Plaintiff,

versus

FOOD & DRUG ADMINISTRATION; DAVID A. KESSLER,
M.D., Commissioner of Food and Drugs,

Defendants - Appellants.

ATTORNEYS GENERAL OF THE STATE OF MINNESOTA;
STATE OF ALASKA; STATE OF ARIZONA; STATE OF
ARKANSAS; STATE OF COLORADO; STATE OF
CONNECTICUT; STATE OF FLORIDA; STATE OF
HAWAII; STATE OF ILLINOIS; STATE OF INDIANA;
STATE OF IOWA; STATE OF LOUISIANA; STATE OF
KANSAS; STATE OF MAINE; STATE OF MARYLAND;
STATE OF MASSACHUSETTS; STATE OF MICHIGAN;
STATE OF MISSISSIPPI; STATE OF MISSOURI; STATE
OF MONTANA; STATE OF NEVADA; STATE OF NEW
HAMPSHIRE; STATE OF NEW JERSEY; STATE OF NEW
MEXICO; STATE OF NEW YORK; STATE OF NORTH
DAKOTA; STATE OF OHIO; STATE OF OKLAHOMA;
STATE OF OREGON; STATE OF PENNSYLVANIA; STATE
OF RHODE ISLAND; STATE OF SOUTH DAKOTA; STATE
OF TEXAS; STATE OF UTAH; STATE OF VERMONT;
STATE OF WASHINGTON; STATE OF WEST VIRGINIA;
STATE OF WISCONSIN; CITY AND COUNTY OF SAN
FRANCISCO; PUBLIC CITIZEN; THE AMERICAN
ACADEMY OF PEDIATRICS; AMERICAN CANCER
SOCIETY; AMERICAN COLLEGE PREVENTIVE MEDICINE;
AMERICAN HEART ASSOCIATION; AMERICAN LUNG
ASSOCIATION; AMERICAN MEDICAL ASSOCIATION;
AMERICAN MEDICAL WOMEN'S ASSOCIATION; AMERICAN
PUBLIC HEALTH ASSOCIATION; AMERICAN SOCIETY OF
ADDICTION MEDICINE; THE HMO GROUP; NATIONAL
ASSOCIATION OF ELEMENTARY SCHOOL PRINCIPALS;

NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS; NATIONAL CENTER FOR TOBACCO-FREE KIDS; STATE OF KENTUCKY; WASHINGTON LEGAL FOUNDATION, ("WLF"); MARIO ANDRETTI; DON GARLITS; AL UNSER; RUSTY WALLACE, CALE YARBOROUGH; RICHARD BURR, CASS BALLENGER, HOWARD COBLE, United States Representatives, LAUCH FAIRCLOTH, United States Senator,

Amici Curiae.

No. 97-1606

COYNE BEAHM, INCORPORATED; BROWN & WILLIAMSON TOBACCO CORPORATION; LORILLARD TOBACCO COMPANY; PHILIP MORRIS, INCORPORATED; RJ REYNOLDS TOBACCO COMPANY; UNITED STATES TOBACCO COMPANY; CONWOOD COMPANY, LP; NATIONAL TOBACCO COMPANY, LP; PINKERTON TOBACCO COMPANY; SWISHER INTERNATIONAL, INCORPORATED; CENTRAL CAROLINA GROCERS, INCORPORATED; J.T. DAVENPORT, INCORPORATED; NORTH CAROLINA TOBACCO DISTRIBUTORS COMMITTEE, INCORPORATED; THE AMERICAN ADVERTISING FEDERATION; AMERICAN ASSOCIATION OF ADVERTISING AGENCIES; ASSOCIATION OF NATIONAL ADVERTISERS, INCORPORATED; MAGAZINE PUBLISHERS OF AMERICA; THE OUTDOOR ADVERTISING ASSOCIATION OF AMERICA, INCORPORATED; POINT OF PURCHASE ADVERTISING INSTITUTE; NATIONAL ASSOCIATION OF CONVENIENCE STORES; ACME RETAIL, INCORPORATED,

Plaintiffs - Appellees,

and

LIGGETT GROUP, INCORPORATED,

Plaintiff,

versus

FOOD & DRUG ADMINISTRATION; DAVID A. KESSLER,
M.D., Commissioner of Food and Drugs,

Defendants - Appellants.

ATTORNEYS GENERAL OF THE STATE OF MINNESOTA;
STATE OF ALASKA; STATE OF ARIZONA; STATE OF
ARKANSAS; STATE OF COLORADO; STATE OF
CONNECTICUT; STATE OF FLORIDA; STATE OF
HAWAII; STATE OF ILLINOIS; STATE OF INDIANA;
STATE OF IOWA; STATE OF LOUISIANA; STATE OF
KANSAS; STATE OF MAINE; STATE OF MARYLAND;
STATE OF MASSACHUSETTS; STATE OF MICHIGAN;
STATE OF MISSISSIPPI; STATE OF MISSOURI; STATE
OF MONTANA; STATE OF NEVADA; STATE OF NEW
HAMPSHIRE; STATE OF NEW JERSEY; STATE OF NEW
MEXICO; STATE OF NEW YORK; STATE OF NORTH
DAKOTA; STATE OF OHIO; STATE OF OKLAHOMA;
STATE OF OREGON; STATE OF PENNSYLVANIA; STATE
OF RHODE ISLAND; STATE OF SOUTH DAKOTA; STATE
OF TEXAS; STATE OF UTAH; STATE OF VERMONT;
STATE OF WASHINGTON; STATE OF WEST VIRGINIA,
STATE OF WISCONSIN; CITY AND COUNTY OF SAN
FRANCISCO; PUBLIC CITIZEN; THE AMERICAN
ACADEMY OF PEDIATRICS; AMERICAN CANCER
SOCIETY; AMERICAN COLLEGE PREVENTIVE MEDICINE;
AMERICAN HEART ASSOCIATION; AMERICAN LUNG
ASSOCIATION; AMERICAN MEDICAL ASSOCIATION;
AMERICAN MEDICAL WOMEN'S ASSOCIATION; AMERICAN
PUBLIC HEALTH ASSOCIATION; AMERICAN SOCIETY OF
ADDICTION MEDICINE; THE HMO GROUP; NATIONAL
ASSOCIATION OF ELEMENTARY SCHOOL PRINCIPALS;
NATIONAL ASSOCIATION OF SECONDARY SCHOOL
PRINCIPALS; NATIONAL CENTER FOR TOBACCO-FREE
KIDS; STATE OF KENTUCKY; WASHINGTON LEGAL
FOUNDATION ("WLF"); MARIO ANDRETTI; DON
GARLITS; AL UNSER; RUSTY WALLACE; CALE
YARBOROUGH; RICHARD BURR, CASS BALLENGER,
HOWARD COBLE, United States Representatives,
LAUCH FAIRCLOTH, United States Senator,

Amici Curiae.

No. 97-1614

NATIONAL ASSOCIATION OF CONVENIENCE STORES;
ACME RETAIL, INCORPORATED,

Plaintiffs - Appellants,

versus

DAVID A. KESSLER, Commissioner of the Food &
Drug Administration; FOOD & DRUG
ADMINISTRATION,

Defendants - Appellees.

ATTORNEYS GENERAL OF THE STATE OF MINNESOTA;
STATE OF ALASKA; STATE OF ARIZONA; STATE OF
ARKANSAS; STATE OF COLORADO; STATE OF
CONNECTICUT; STATE OF FLORIDA; STATE OF
HAWAII; STATE OF ILLINOIS; STATE OF INDIANA;
STATE OF IOWA; STATE OF LOUISIANA; STATE OF
KANSAS; STATE OF MAINE; STATE OF MARYLAND;
STATE OF MASSACHUSETTS; STATE OF MICHIGAN;
STATE OF MISSISSIPPI; STATE OF MISSOURI; STATE
OF MONTANA; STATE OF NEVADA; STATE OF NEW
HAMPSHIRE; STATE OF NEW JERSEY; STATE OF NEW
MEXICO; STATE OF NEW YORK; STATE OF NORTH
DAKOTA; STATE OF OHIO; STATE OF OKLAHOMA;
STATE OF OREGON; STATE OF RHODE ISLAND; STATE
OF SOUTH DAKOTA; STATE OF TEXAS; STATE OF
UTAH; STATE OF VERMONT; STATE OF WASHINGTON;
STATE OF WISCONSIN; STATE OF WEST VIRGINIA;
CITY AND COUNTY OF SAN FRANCISCO; PUBLIC
CITIZEN; THE AMERICAN ACADEMY OF PEDIATRICS;
AMERICAN CANCER SOCIETY; AMERICAN COLLEGE
PREVENTIVE MEDICINE; AMERICAN CANCER SOCIETY;
AMERICAN LUNG ASSOCIATION; AMERICAN MEDICAL
ASSOCIATION; AMERICAN MEDICAL WOMEN'S
ASSOCIATION; AMERICAN PUBLIC HEALTH
ASSOCIATION; AMERICAN SOCIETY OF ADDICTION
MEDICINE; THE HMO GROUP; NATIONAL ASSOCIATION
OF ELEMENTARY SCHOOL PRINCIPALS; NATIONAL

ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS;
 NATIONAL CENTER FOR TOBACCO-FREE KIDS; STATE
 OF KENTUCKY; WASHINGTON LEGAL FOUNDATION,
 ("WLF"); MARIO ANDRETTI, DON GARLITS; AL
 UNSER; RUSTY WALLACE; CALE YARBOROUGH; RICHARD
 BURR, CASS BALLENGER, HOWARD COBLE, United
 States Representatives, LAUCH FAIRCLOTH,
 United States Senator,

Amici Curiae.

No. 97-1605

UNITED STATES TOBACCO COMPANY; BROWN &
 WILLIAMSON TOBACCO CORPORATION; CONWOOD
 COMPANY, LP; NATIONAL TOBACCO COMPANY, LP;
 PINKERTON TOBACCO COMPANY; SWISHER
 INTERNATIONAL, INCORPORATED; CENTRAL CAROLINA
 GROCERS, INCORPORATED; J.T. DAVENPORT,
 INCORPORATED; NORTH CAROLINA TOBACCO
 DISTRIBUTORS COMMITTEE, INCORPORATED,

Plaintiffs - Appellants,

versus

FOOD & DRUG ADMINISTRATION; DAVID A. KESSLER,
 M.D., Commissioner of Food and Drugs,

Defendants - Appellees.

ATTORNEYS GENERAL OF THE STATE OF MINNESOTA;
 STATE OF ALASKA; STATE OF ARIZONA; STATE OF
 ARKANSAS; STATE OF COLORADO; STATE OF
 CONNECTICUT; STATE OF FLORIDA; STATE OF
 HAWAII; STATE OF ILLINOIS; STATE OF INDIANA;
 STATE OF IOWA; STATE OF LOUISIANA; STATE OF
 KANSAS; STATE OF MAINE; STATE OF MARYLAND;
 STATE OF MASSACHUSETTS; STATE OF MICHIGAN;
 STATE OF MISSISSIPPI; STATE OF MISSOURI; STATE
 OF MONTANA; STATE OF NEVADA; STATE OF NEW
 HAMPSHIRE; STATE OF NEW JERSEY; STATE OF NEW

MEXICO; STATE OF NEW YORK; STATE OF NORTH DAKOTA; STATE OF OHIO; STATE OF OKLAHOMA; STATE OF OREGON; STATE OF PENNSYLVANIA; STATE OF RHODE ISLAND; STATE OF SOUTH DAKOTA; STATE OF TEXAS; STATE OF UTAH; STATE OF VERMONT; STATE OF WASHINGTON; STATE OF WISCONSIN; STATE OF WEST VIRGINIA; CITY AND COUNTY OF SAN FRANCISCO; PUBLIC CITIZEN; THE AMERICAN ACADEMY OF PEDIATRICS; AMERICAN CANCER SOCIETY; AMERICAN COLLEGE PREVENTIVE MEDICINE; AMERICAN HEART ASSOCIATION; AMERICAN LUNG ASSOCIATION; AMERICAN MEDICAL ASSOCIATION; AMERICAN MEDICAL WOMEN'S ASSOCIATION; AMERICAN PUBLIC HEALTH ASSOCIATION; AMERICAN SOCIETY OF ADDICTION MEDICINE; THE HMO GROUP; NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS; NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS; NATIONAL CENTER FOR TOBACCO-FREE KIDS; STATE OF KENTUCKY; WASHINGTON LEGAL FOUNDATION, ("WLF"); MARIO ANDRETTI; DON GARLITS; AL UNSER; RUSTY WALLACE; CALE YARBOROUGH; RICHARD BURR, CASS BALLENGER, HOWARD COBLE, United States Representatives; LAUCH FAIRCLOTH, United States Senator,

Amici Curiae.

O R D E R

On a poll of the court on the petition for rehearing en banc there voted in favor of rehearing en banc Judges Murnaghan, M. Blane Michael and Motz, and there voted against rehearing en banc Judges Widener, Ervin, Niemeyer, Luttig, Williams and Traxler.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc shall be, and it hereby is, denied.

The panel considered the petition for rehearing and is of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it hereby is, denied.

With the concurrence of Judge James H. Michael.

Judge Hall dissents. He would grant the petition for rehearing for the reasons expressed in his separate opinion filed with the opinion of the panel.

/s/ H. E. Widener, Jr.

For the Court

Chief Judge Wilkinson, and Judges Wilkins, Hamilton and King, being disqualified, did not participate in this decision.